Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service	)	CC Docket No. _____

To: The Commission

PETITION FOR RULEMAKING

The Committee for Effective Cellular Rules ("CECR"), acting pursuant to Section 1.401 of the Commission's rules, hereby petitions to repeal Section 22.23(c)(3)(ii) and to modify Sections 22.31(a)(1)(i) and 22.31(f) of the Commission's Rules to allow for the filing of competing applications in response to any application by an incumbent cellular licensee to expand its Cellular Geographic Service Area ("CGSA"). More specifically, Sections 22.31(a)(1)(i) and 22.31(f) should be revised by adding the following underscored language:

> 22.31(a)(1)(i). Notwithstanding any other provision of the rule section and rule provision of this part, applications by other than licensees or grantees for a Metropolitan Statistical Area ("MSA") to serve unserved areas outside the presently authorized CGSA but within the MSA will not be accepted for five years from the date of the grant of the original construction authorization of each system in an MSA <u>except in response to an application by the particular licensee or grantee to serve an unserved area outside a presently authorized CGSA</u>.

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* * *

> 22.31(f) Rural Service Areas. The provisions of this paragraph shall not apply to initial applications to serve a Rural Cellular Area in the Domestic Public Cellular Radio Telecommunications Service. Applications by entities other than licensees or grantees for a particular RSA to serve unserved areas outside the presently authorized CGSA but within the Rural Service Area (RSA) will not be accepted for five years from the grant of the original construction authorization of each system in an RSA <u>except in response to an application by the particular licensee or grantee to serve an unserved area outside the presently authorized CGSA</u>. [Remainder of section deleted]

In the support of this petition, the following is stated:

1. Sections 22.31(a)(1)(i) and 22.31(f) preclude anyone except the incumbent licensee for the particular MSA or RSA from filing a fill-in application during the first five years subsequent to the date of the grant of the licensee's or grantee's original construction authorization. Section 22.23(c)(3)(ii) facilitates that prohibition by providing that an expansion of the CGSA within the 5-year fill-in period would not constitute a major amendment subject to competing applications. The Commission adopted the foregoing rules in the belief that the underlying policy "promotes the expeditious, orderly processing of cellular applications and prevents the 'regulatory paralysis' that could ensue if these areas were open to unrestricted applications at the same time

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that we are attempting to complete the nationwide licensing of cellular service." Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, ("Lottery Reconsideration Order"), 58 RR2d 677, 688, 101 FCC Rcd 577, ___ (1985). See also Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, 6 FCC Rcd 6185, 6188 n.6 (1991). In essence, the Commission's rules regarding the fill-in period reflect the Commission's assumption that it would be more efficient from both the Commission's perspective and the existing licensee's perspective to preclude competing applications.

2. The Commission's policy as embodied in the aforementioned sections violates Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(e), and as interpreted by Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945). In Ashbacker, the Court required the Commission to hold a hearing on two mutually exclusive broadcast applications before a grant could be made to either. Id. at 329-330, 334. As the United States Court of Appeals for the District of Columbia Circuit later observed, "The basic teaching of the Ashbacker case is that

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comparative consideration by the Commission and competition between the applicants is the process most likely to serve the public." Community Broadcasting Co. v. Federal Communications Commission, 274 F.2d 753, 759 (D.C. Cir. 1960). The perceived benefit in competition, moreover, overrides any Commission desire for efficiency. See New South Media Corporation v. Federal Communications Commission, 685 F.2d 708, 717 (D.C. Cir. 1982) (Commission could not dismiss timely-filed competing applications or preclude the filing of additional competing applications in order to avoid expected administrative burdens).

3. To be sure, Ashbacker concerned two qualified applicants, and nothing in that decision precludes the Commission from exercising its general rulemaking authority to establish eligibility standards for prospective applicants. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956) (Commission could adopt conformance with multiple ownership rules as a prerequisite to filing an application). But that general authority to establish eligibility standards does not entitle the Commission to foreclose the filing of any competing applications.

4. This latter point was made clear in Citizens Communications Center v. Federal Communications Commission, 447 F.2d 1201 (D.C. Cir. 1971). In that case, the court

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reversed an FCC policy statement which would have precluded any hearing on a competing application unless and until an initial hearing on the incumbent licensee's renewal application had shown that the incumbent licensee's prior service had not been "substantially attuned to meeting the needs and interests of its [service] area. . ." Id. at 1203 n.3, 1204-1205. The Court observed that the Communications Act of 1934 "says nothing about a presumption in favor of incumbent licensees at renewal hearings[,]" and that the policy statement failed to account for the "towering shadow" of Ashbacker. Id. at 1207, 1210. The Court acknowledged that incumbent licensees could reasonably expect renewal if superior service had been delivered, but that an incumbent's expectation could not come at the expense of a competing applicant's right to a comparative hearing. Id. at 1213.

5. The standards for consideration of an incumbent licensee's "renewal expectancy" were ultimately articulated by the Commission and accepted by the Court of Appeals. Central Florida Enterprises, Inc. v. Federal Communications Commission, 683 F.2d 503, 506-507 (D.C. Cir. 1982). In affirming the Commission's action, however, the Court expressed concern that "the FCC's new approach could still degenerate into precisely the sort of irrebuttable presumption in favor of renewal that we have warned against." Id. at 508.

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6. The import of the foregoing cases is clear: the Commission can adopt eligibility and comparative criteria to advance the public interest, but that general authority cannot justify the total preclusion of competing applications.[1]

7. The Commission can of course establish cut-off rules for the acceptance of license applications. But it is quite another matter to preclude the filing of competing applications when a licensee files an application to expand its CGSA -- an action that the Commission has otherwise deemed to be a major amendment (except as recently modified by the Second Report and Order in Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, 7 FCC Rcd 2449 (1992)). The same statutory goals which compelled the Supreme Court to require comparative consideration of mutually-exclusive broadcast

[1] The court's decision in Maxcell Telecom Plus, Inc. v. Federal Communications Commission, 815 F.2d 1551 (D.C. Cir. 1987), is in accord with Citizens Communications Center v. Federal Communications Commission, supra, and Central Florida Enterprises, Inc. v. Federal Communications Commission, supra. In Maxcell, the Court merely held that the Commission could adopt cut-off rules for the filing of initial applications. 815 F.2d at 1561. However, the Court did not address the Commission's authority to preclude the filing of competing applications in response to an application filed by an incumbent licensee to expand its CGSA. In fact, the Court acknowledged then-existing Commission rules which appeared to allow the filing of competing applications in response to a licensee's modification application. 815 F.2d at 1557.

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applications in Ashbacker demands that the Commission allow (subject to whatever reasonable eligibility requirements it may establish) the filing of competing applications in response to an initial licensee's request to expand its CGSA.

WHEREFORE, in view of the foregoing, CECR respectfully requests that the Commission modify its rules as proposed herein.

Respectfully submitted,

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